

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

BLIZZARD ENTERTAINMENT, INC.,)
AND VALVE,)
)
Plaintiff,)

VS.)

No. C 15-4084 CRB

LILITH GAMES (SHANGHAI) CO.)
LTD., and UCOOL, INC.,)
)
Defendants.)

San Francisco, California
Friday, April 8, 2016

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

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BY: **MARC E. MAYER, ESQUIRE**

For Defendant uCool, Inc.:

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BY: **CLAUDE M. STERN, ESQUIRE**
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Reported By: Katherine Powell Sullivan, CSR No. 5812, RMR, CRR
Official Reporter

Friday - April 8, 2016

10:03 a.m.

P R O C E E D I N G S

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THE CLERK: Calling civil action 15-4084, Blizzard Entertainment, Inc. et al. versus Lilith Games.

Counsel, please step forward to the podium and state your appearances.

MR. MAYER: Good morning, Your Honor. Marc Mayer for the plaintiffs.

THE COURT: Good morning.

MR. STERN: Good morning, Your Honor. Claude Stern and Evette Pennypacker, of Quinn Emanuel, on behalf of uCool.

THE COURT: Good morning.

MR. STERN: Good morning.

THE COURT: So, as we know, the Court had granted the defendant's motion with respect to the original -- I think it was the original, might have been the first, but I think it was the original complaint. Pointed out some defects -- as the Court viewed it, some defects -- primarily, that the plaintiff failed to meet their burden of alleging in detail copyright ownership and failed to identify their aspects of their work that the defendant infringed, and granted leave to amend.

And now the defense has -- pardon me, plaintiffs have amended their complaint. And it appears to successfully address those shortcomings.

1 The question, of course, is, you know, how to really test
2 the evidence in the case. I mean, is there really a conflict?
3 And what is the evidence in the case? Which I think is more
4 appropriately addressed through a summary judgment motion than
5 it is on a motion to dismiss, as I see it, because I think that
6 the complaint is successful in stating the claims.

7 But I think I have to turn to the defense and ask them if
8 they want to add to this and try to talk me out of it.
9 Whatever you feel comfortable doing. But, you know,
10 tentatively -- and I usually give a tentative just because I
11 think it then focuses the parties' argument.

12 Yes.

13 **MS. PENNYPACKER:** Thank you, Your Honor. I would like
14 to address your question. In particular, the question, it
15 seems to me, that you're asking is whether this is the proper
16 time to look at the --

17 **THE COURT:** Yes, that's exactly the question.

18 **MS. PENNYPACKER:** And we would submit that it is, Your
19 Honor, because in the cases that we have cited to you, the
20 issue of ownership was decided as a matter of law. And,
21 candidly, they weren't motion-to-dismiss cases. But at the
22 time that those cases were decided, the same evidence that you
23 have before you now was before those courts. And they decided
24 the issue as a matter of law.

25 Plaintiff has not indicated that there would be any

1 additional evidence to consider but, rather, has simply argued
2 that we shouldn't decide this now as a procedural matter.

3 And I'm not sure that plaintiffs would be able to come
4 forward with any additional such evidence --

5 **THE COURT:** If that's true -- and I appreciate your
6 remarks. If that's true, though it requires you to essentially
7 refile and make your argument that there is no further evidence
8 or that the evidence is in conflict on any material aspect,
9 isn't it much better to go up on appeal -- if there is an
10 appeal -- on that record than on something in which the test
11 is, you know, the test for a motion to dismiss?

12 The problem I've always found in 20 years or so is that
13 you can't predict with any degree of certainty across the board
14 in cases how motions to dismiss which are granted are treated
15 by an appellate court.

16 And it seems to me there is a real predisposition by
17 appellate courts to be very technical on motions to dismiss,
18 and far less so on summary judgment. That is, they say, okay,
19 everybody has had an opportunity to, quote, litigate, develop
20 their record; it's a full record. Not as full as a trial would
21 be. Full enough for these purposes. And there we are. You
22 know, we have at it.

23 So I guess what I'm saying to you is, is that, as you
24 concede, I think that these cases that you are relying on came
25 up in the context of summary judgment. Isn't that one --

1 **MS. PENNYPACKER:** One was post trial and one was
2 summary judgment, that's correct.

3 **THE COURT:** So you never know what goes on in people's
4 minds. But I have to believe that they looked at it and said,
5 okay, plaintiffs had a full, ample, adequate shot; there we
6 are.

7 **MS. PENNYPACKER:** I --

8 **THE COURT:** Yes.

9 **MS. PENNYPACKER:** I have no way of knowing obviously.

10 **THE COURT:** I don't either. I don't either.

11 **MS. PENNYPACKER:** And I don't know, standing here
12 today, whether or not there was even a motion to dismiss filed.
13 What I can say is that right now the evidence that is before
14 Your Honor is the same evidence those courts ultimately relied
15 upon to find that ownership was -- that there was an
16 abandonment of the copyright.

17 And right now, sitting here today, the complaint
18 incorporates by reference the very agreements that show
19 abandonment. One doesn't even need to go to a blog post or any
20 other information that's outside what's incorporated directly
21 by reference into the complaint.

22 And so right now, on this procedural posture, we are well
23 within the bounds of what motion to dismiss will look at on the
24 record. So we think that it would be appropriate now to look
25 at this, and efficient for the Court because no evidence can

1 come in.

2 What those decisions that we cited to Your Honor say is
3 even where there was deposition testimony or a declaration from
4 an author, because that information was directly contrary to
5 what was in the document evidence showing abandonment, the
6 courts excluded that evidence; they didn't consider it.

7 And right now you have before Your Honor an affirmative
8 statement in the original assignment agreement from the very
9 first author of DotA, saying that the work was dedicated to the
10 public. Twice it says that in agreement.

11 So it's difficult to understand what we would all gain
12 from spending a lot more resources on litigating that.

13 **THE COURT:** I'll turn to plaintiffs.

14 **MR. MAYER:** Sure. Your Honor, I would certainly agree
15 that this is not an issue at the pleading stage.

16 What we've alleged -- and, again, there are some
17 complexities because the work we're suing on is work called
18 DotA 2. We do have a registration. The registration is prima
19 facie evidence of the ownership. The dispute seems to be over
20 some of the underlying material.

21 What we've alleged in the complaint is we've alleged that
22 we own that underlying material; that we own it pursuant to a
23 series of assignment agreements. There are three particular
24 assignment agreements that are now in the record. There's also
25 an end user license agreement that gives certain ownership

1 rights.

2 What the defendants are doing is basically leveling a
3 full-scale attack on the facts of our ownership. They're
4 arguing that one of these four assignees may have abandoned his
5 rights. And abandonment certainly is a factual issue.

6 There are issues here about what author contributed what;
7 whether there may be other people that may claim some sort of
8 amorphous authorship. But at the end of the day, there are a
9 series of agreements. There's no dispute that there are these
10 agreements.

11 And the agreements are in the record. They establish --
12 certainly at the pleading stage they've met our burden to show
13 that we own or at least have sufficiently alleged ownership of
14 DotA. And if we want to fight down the road over who authored
15 what and whether there's abandonment by one of the four
16 authors, that's for a later day.

17 **MS. PENNYPACKER:** May I respond? Thank you.

18 **THE COURT:** Sure.

19 **MS. PENNYPACKER:** I think that, actually, plaintiff's
20 comments confirm that this is the right time to decide this
21 issue because the licenses are before the Court.

22 There is no dispute as to the contents of the license or
23 their authenticity. They were produced by the plaintiffs in
24 the case. They are not disputing that they are incorporated by
25 reference in the complaint.

1 And in the first amended complaint the only allegation for
2 ownership of the work that we're discussing is in paragraph 26.
3 And reads, in its entirety:

4 "Pursuant to written agreements, Blizzard and Valve
5 collectively own 100 percent" --

6 **THE COURT:** What page are you reading of the
7 complaint?

8 **MS. PENNYPACKER:** It is page 11, paragraph 26. The
9 last paragraph on page 11 of the first amended complaint. And
10 in that paragraph it says:

11 "Pursuant to written agreements, Blizzard and Valve
12 collectively own 100 percent of the copyright and all
13 original expression embodied within the DotA mod."

14 That is literally the only allegation of ownership for
15 that particular work. And that is, by definition, a conclusory
16 allegation.

17 So we have before Your Honor the licenses that are not in
18 dispute. And it seems strange to have to push forward beyond
19 this stage when the parties are basically in agreement as to
20 those licenses.

21 And if I could have your indulgence to look at --

22 **THE COURT:** Sure.

23 **MS. PENNYPACKER:** -- the license that we are talking
24 about, I think you would understand further why we would press
25 this at this stage.

1 Exhibit 1 to the LaFond declaration that was submitted
2 with our opening papers is the license from Kyle Summer, who is
3 known as Eul -- that's E-u-l -- to Valve.

4 **THE COURT:** I'm sorry, he's --

5 **MS. PENNYPACKER:** It's Exhibit 1 to the LaFond
6 declaration, the opening LaFond declaration.

7 **THE COURT:** I have it here.

8 **MS. PENNYPACKER:** Thank you.

9 **THE COURT:** September 27th, is that the one?

10 **MS. PENNYPACKER:** Yes. It's dated September 27, 2010.
11 And Kyle Summer, who is a party to this license to Valve, was
12 the original creator of the DotA mod. So he isn't just any one
13 of the authors. He is the original author of this particular
14 work.

15 And as Your Honor will see, in paragraph B, under the
16 recitals, it says, "Seller" -- who is Eul/Kyle Summer. "Seller
17 later ceased his development of the Ancients (DotA) and
18 released his work to the public for further development."

19 It's right there in black and white.

20 Later, and the next paragraph, says, "To the extent seller
21 retains any rights in defense of the Ancient, Valve desires to
22 acquire all those rights."

23 The second paragraph I just read references the first
24 paragraph, to say that, We don't even know if he owns any
25 rights.

1 And then if you look further, if you turn to page 3 of
2 that agreement, under representations and warranties, under
3 3.1.2, it specifically references this dedication to the
4 public.

5 Under "Intellectual Property" it says, "Except for
6 seller's foreign post on the warcenter.com formally posted
7 at" -- and then there is a long URL I won't trouble to read
8 into the record -- "seller has not assigned or otherwise
9 transferred ownership of..." and then it goes on.

10 This makes clear that except for that dedication to the
11 public, he has not otherwise assigned. Kyle Summer viewed that
12 blog posting as an assignment to the public of the work that he
13 had created for DotA. And all of that work was assigned in
14 2004, many, many years before this license.

15 This license is the foundation -- I mean, these
16 representations are the foundation for showing the abandonment
17 of all of the other work.

18 So even though plaintiffs then went and tried to clean
19 this up by getting this license and getting licenses from
20 others who continued to work on the DotA mod after this
21 transfer to the public in 2004, they've never owned the
22 original mod because Mr. Summer dedicated that to the public.

23 So, at most, they can possibly own things that were
24 created thereafter. But we don't know what those things are,
25 based on this conclusory allegation in paragraph 26. There's

1 nowhere in the complaint that details who owns what or who
2 worked on what.

3 So we think that Your Honor actually has sufficient
4 evidence now to rule on the issue of abandonment. It's very
5 clear in this agreement.

6 We've also provided a copy of the Web post that is still
7 available on archive.net. And that's at Exhibit 6 to the
8 LaFond declaration. And you can see that -- I know that
9 Blizzard has -- has contested the admissibility of this
10 particular document, but -- not only recited case law --

11 **THE COURT:** So your point essentially, among other
12 things, is, look they allege that Blizzard collectively and
13 Blizzard and Valve collectively had a hundred percent of this.
14 And the problem is that it was given away previously to the
15 public or dedicated to the public or abandoned by the creator.

16 And so what can you own a hundred percent of when you
17 didn't own it to begin with? To begin with, you may have owned
18 it, but before the agreement was executed, before the license
19 agreement was executed.

20 Certainly, they may have something subsequent to the
21 execution of a license, but that's not what this lawsuit is
22 about. Is it? Maybe it is. I don't know. That's their
23 argument.

24 Is that fair to say that's what you're saying? I don't
25 want to misquote you and not understand what you're saying.

1 **MS. PENNYPACKER:** I think that's correct, Your Honor.

2 I think our view is that this license or this dedication to the
3 public that happened in 2004 was abandonment of the copyright
4 in the DotA mod.

5 And that was the beginning of the creation of this
6 particular work that they're suing on. And so it doesn't --
7 whatever happened after that, one must first look at this
8 because this was the foundation of it.

9 The other thing to point out is that all of the characters
10 that plaintiffs assert the Heroes Charge game infringes, they
11 say are in both DotA and then DotA 2; DotA 2 being registered
12 by Valve, a plaintiff in this lawsuit.

13 And if that's the case, we at least need to know which of
14 these things are owned by whom. If all of the characters that
15 we are accused of infringing were dedicated to the public in --
16 by Mr. Summer in 2004, there is no lawsuit against us on even
17 DotA 2, if those characters appeared first in DotA and then
18 later in DotA 2.

19 **THE COURT:** Respond?

20 **MR. MAYER:** Your Honor, these are exactly the kind of
21 issues that are not appropriate at the pleading stage.

22 What we've alleged is that Blizzard and Valve collectively
23 own 100 percent of the copyright and all original expression
24 embodied within the DotA mod.

25 There are four agreements. We're now engaged in a dispute

1 over which agreement governs; and what was conveyed in one
2 agreement versus a second agreement and then a third agreement;
3 and what expression is original; and which characters were
4 created in which version, and who created those characters.
5 These are all complicated --

6 **THE COURT:** So your argument essentially is that there
7 is ambiguity -- that there are issues of fact with respect to
8 who owns what was intended to be encompassed within these
9 agreements and how these agreements were treated; and,
10 therefore, that's factually intensive in their disputes with
11 respect to that. Is that --

12 **MR. MAYER:** Yes. I'd phrase it a little bit
13 differently, which is that there are four authors of the DotA
14 mod. Those four authors contributed different elements. They
15 picked up on each other's work.

16 **THE COURT:** Well, this is why I think that the motion
17 to dismiss should be denied, because it seems to me that if
18 you're right, you'll have an easy case. You'll be right back
19 here in a summary judgment, and we go through it and deal with
20 it on that basis after some limited discovery.

21 I don't want discovery on damages at this point. It
22 appears to me that the discovery should be limited to the
23 issues that essentially are liability issues as distinct from
24 damages issues.

25 And maybe I'll see you back here in 90 days or 120 days,

1 and we'll sort through -- I don't know how long it's going to
2 take, but we'll sort through the issues and see if you're
3 right. At least from the Court's point of view.

4 I sort of look at it and say you may be right. You may be
5 right. And I know that it seems to you and to your client sort
6 of like a waste. And I appreciate that. But sometimes what is
7 characterized as a waste and it gets up to the court of
8 appeals, you know, judges look at it and they say, well, not
9 really a waste. And then you've had a waste. Then you've
10 really -- you've had two years of expensive litigation.

11 So, anyway, the motion to dismiss will be denied. And
12 discovery will be limited to liability issues. And I'll see
13 you back here whenever somebody is ready to come back.

14 Mr. Stern.

15 **MR. STERN:** Your honor, a question for you.

16 **THE COURT:** Yes.

17 **MR. STERN:** And I understand Your Honor has denied the
18 motion. I'm not rearguing it, but it is a question about the
19 summary judgment motion that we would be focusing on.

20 Right now, if Your Honor reads the complaint, the
21 complaint actually claims -- seems to claim infringement of
22 five works. Those works are StarCraft, Diablo, World of
23 Warcraft, DotA 1, and DotA 2. Those are the five works.

24 The purpose of the motion to dismiss was to say
25 essentially on the latter half of the argument about the

1 similarities of the character, that gets rid of Starcraft and
2 Diablo. On the defective registration argument, the argument
3 Your Honor just addressed, that gets rid of DotA 1 and DotA 2.
4 And that leaves the case being a case of Warcraft against the
5 uCool product.

6 And I appreciate Your Honor has said that we should focus
7 on the liability side of the case.

8 **THE COURT:** Well, I think you're going to get to the
9 point of how much you have to deal with. And I think that's a
10 very good point. And I think the answer is you can move for
11 partial summary judgment.

12 You pick what I call the money issues -- see, I have no
13 way of looking at these things and figuring out -- it's like a
14 patent case. I have no way of looking at something where there
15 are a number of claims to know whether this is a big item or
16 little item; it's put in or not put in; or it's put in because
17 of this or that or so forth.

18 The lawyers are in a much better position than the Court
19 to make that determination. The lawyers are motivated by
20 business concerns as distinct from just legal concerns. So you
21 certainly are entitled to make a partial motion for summary
22 judgment. And that may very well clear the brush, as it were.

23 **MR. STERN:** And, Your Honor, if we do make the motion
24 for partial summary judgment as Your Honor suggests, we want to
25 make sure that isn't with prejudice to any later motions in the

case that we may have to follow.

THE COURT: It won't be.

MR. STERN: Wonderful.

THE COURT: Yeah.

MR. STERN: Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

MR. MAYER: Thank you, Your Honor.

MS. PENNYPACKER: Thank you, Your Honor.

(At 10:24 a.m. the proceedings were adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, April 18, 2016

Katherine Sullivan

Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter